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**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: APR 2 5 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a neurocritical care specialist. At the time she filed the petition, the petitioner was a [redacted]. She now works at [redacted]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation* (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 30, 2010. In an introductory statement, counsel stated that the petitioner "has already had a substantial impact on neurology and neurocritical care. Therefore, retaining [the petitioner's] rare expertise . . . far outweighs the interest in protecting the U.S. labor market."

Counsel asserted that the petitioner would be unable to obtain a labor certification, because her position requires a combination of skills and special knowledge and abilities. Counsel cited Department of Labor regulations and a decision by the Board of Alien Labor Certification Appeals (BALCA) to support the claim that a labor certification application for the petitioner would likely be denied as "unduly restrictive."

The inability to obtain a labor certification would not, by itself, be a deciding factor in the petitioner's favor. The wording of the statute makes it clear that exemption from the job offer requirement rests on the national interest, not on an alien's inability to obtain a labor certification. Even so, the cited materials do not strongly support counsel's assertions. In the cited administrative decision, BALCA ruled:

> This Panel finds the unqualified term "artistic ability" to be vague and subjective without any guidelines or criteria available to determine whether an applicant is qualified for the position. Accordingly, the special requirement of artistic ability is unduly restrictive under §656.21(b)(2), because the Employer has rejected otherwise qualified U.S. workers based on this vague, subjective requirement.

*Michael Graves Architect*, 89-INA-131, 1990 WL 300112 (Bd. Alien Lab. Cert. App. Feb. 21, 1990). Counsel compared the vaguely-defined "artistic ability" in *Michael Graves* to the present petitioner's "expertise in neurology procedures and novel research." In *Michael Graves*, BALCA's objection was that "artistic ability" is subjective and difficult to "quantify . . . in terms of length of training or experience." *Id.* Counsel did not show that the same can be said for medical expertise. The outcome of a medical procedure, or the results of a research study, rest on measurable and objective factors, rather than the individual esthetic sensibilities of an artist or architect.

Counsel stated that a job requiring a combination of duties is not amenable to labor certification, because "the Department of Labor stipulates that the employer describe its job opportunity without "unduly restrictive" requirements [22 C.F.R. sec. 656.21(b)(2)]." The cited regulation actually appears in chapter 20, not 22, of the Code of Federal Regulations. The regulation contains no flat prohibition relating to a combination of duties. Rather, 20 C.F.R. § 656.21(b)(2)(ii) reads:

> If the job opportunity involves a combination of duties, for example engineer-pilot, the employer must document that it has normally employed persons for that combination of duties and/or workers customarily perform the combination of duties in the area of intended employment, and or the combination job opportunity is based on a business necessity.

The above regulation clearly allows, under certain conditions, labor certification for a position that "involves a combination of duties." Counsel cited no BALCA decision or other authoritative source to show that the Department of Labor has categorically disallowed labor certification for positions that combine the duties of a physician and those of a researcher.

Counsel contended that the petitioner, having "**been hired to serve in leading roles at some of the country's and the world's top medical institutions . . . was selected after nationwide searches in competition with extremely highly qualified peers because she is regarded as superior . . . and because she is able to achieve results that are far beyond the norm**" (counsel's emphasis).

The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is by no means a settled or undisputed fact that the petitioner has had "leading roles" at leading medical institutions, or that those institutions hired her on the basis of her reputation as a superior physician/researcher.

Counsel listed the petitioner's past history, under the heading "Leading Roles," beginning with her selection "to attend **Government Medical College**" (counsel's emphasis) and her doctoral studies with Medvarsity Online. Counsel did not explain how attending medical school and earning a degree online amount to "leading roles." Counsel then listed various hospitals where the petitioner served as "House Staff Physician," "Staff Neurologist" and "Chief of House Staff," and observed that the petitioner "will begin a Neuro-critical Care Fellowship at **Cleveland Clinic**" (counsel's emphasis).

The positions listed above have all been residencies, fellowships or other temporary training assignments, indicating that each of the employers considered the petitioner's professional training to be incomplete. Furthermore, there exists no blanket waiver based on the reputation of a given employer. Whatever an institution's standing in a particular field, an alien's employment there is not *prima facie* evidence of eligibility for the waiver. One's impact and influence on the field, rather than where that impact originates, is the chief consideration.

The petitioner submitted background information regarding a shortage of physicians. Congress addressed the issue of physician shortages with the passage of section 203(b)(2)(B)(ii) of the Act, which spells out a procedure by which a physician in a shortage area can qualify for the waiver. The implementing regulations for this procedure appear at 8 C.F.R. § 245.12. The petitioner did not submit the evidence that those regulations require, relying instead on the general assertion of a shortage in her specialty. Outside of the statutorily specified provisions identified above, a shortage of workers is grounds for obtaining, rather than waiving, a labor certification. *See NYSDOT*, 22 I&N Dec. 215, 218.

A section of the record bears the heading "Job Offers," but the included exhibits did not document job offers. Instead, they referred to preliminary steps such as scheduled job interviews. Among these materials is an electronic mail message from [redacted] a physician placement firm, indicating that the petitioner "completes training in **June, 2011**" (emphasis in original), consistent with the finding that the petitioner was a trainee, rather than an established figure in her field, at the time she filed the petition in 2010.

The petitioner submitted copies of her published work, not all of which took the form of scholarly research articles. Some of the materials are letters to the editor in which the petitioner expressed personal opinions (about issues such as religion and physician-assisted suicide). These materials air the

petitioner's views on controversial topics, but do not bear on her eligibility for the national interest waiver. The petitioner was also the editor of a study guide for the "PG Entrance Examination" published in 2003 while the petitioner was studying for a post-graduate diploma in medical informatics. The accompanying "About the Editor" capsule biography mentions that the petitioner received student awards in ophthalmology, pediatrics and mathematics, but does not mention neurocritical care or indicate that the petitioner, as of 2003, had any training or expertise in that specialty. The document, therefore, is of questionable relevance to the present proceeding.

With respect to the petitioner's peer-reviewed scholarly work, counsel asserted that "citation to once [*sic*] published work is the most objective indicator of the impact that one's work has had within given medical and scientific fields." The petitioner, however, submitted no evidence of citation of her work.

The petitioner submitted several witness letters. According to counsel, "these letters come from experts in the field from around the country both from institutions at which [the petitioner] has worked and institutions at which she has not worked. Indeed she is regarded both by her immediate colleagues and by independent evaluators in the field as possessing extraordinary abilities." By calling citations "the most objective indicator of the impact [of] one's work," counsel effectively, if indirectly, acknowledged that the letters are a less objective indicator of the petitioner's impact. Therefore, if the petitioner does not produce citation evidence commensurate with the claims in the letters, then the discrepancy would diminish the weight of the letters rather than undermine the significance of the citations.

Two of the witnesses are officials at the Cleveland Clinic. [redacted] stated that the petitioner "has risen to the top of her field" and "has excelled to a degree matched by very few others in the clinical, research, and academic aspects of the field." [redacted] added: "Even more impressive . . . , she has been selected as a **reviewer** for publications" (emphasis in original). [redacted] summarized a clinical case in which the petitioner saved a critically ill patient, and cited "a severe shortage of neurologists specializing in neurocritical care in the United States" (emphasis in original).

[redacted] head of the Cleveland Clinic's Neuro Intensive Care Unit, stated that the petitioner "is one of a small group of the most talented physician-scientists with specialization in Neurology and Medical Informatics in the nation."

The remaining witnesses represent a variety of medical institutions in the United States. [redacted] stated that the petitioner "is one of the top neurologists with additional and rare expertise in neurology, neurocritical care and medical research," and has "been invited as a **peer reviewer**" for two journals (emphasis in original).

[redacted] assistant professor at the University of Texas Health Science Center at Houston, completed a neurocritical care fellowship at the Cleveland Clinic the same year that the petitioner began her own fellowship there. [redacted] stated that the petitioner's "specialization in diagnosis,

treatment and prevention of stroke and critically ill neurological patients is virtually unmatched by the vast majority of her peers," and that the petitioner "has been entrusted to several leading and critical roles throughout her career."

[redacted] fellowship director for neurocritical care at the University of California, San Francisco, summarized a clinical case in which the petitioner spotted a previously undiagnosed nutritional deficiency that exacerbated a patient's seizure disorder. [redacted] described some of the petitioner's published research, and stated: "A further testament to her expertise is her invitation to join some of the most prestigious medical societies."

[redacted] assistant professor at Columbia University, New York, New York, stated that the petitioner "**is regarded as one of the leading neurologists in the United States with additional expertise in neurocritical care**," and that "there is currently a **shortage of neurologists in the United States**" (emphasis in original). Regarding the petitioner's memberships in professional organizations, [redacted] stated: "*Membership* in these prestigious organizations is only awarded to those physician-scientists who have attained an extraordinary level of expertise in neurological disorders matched by very few of their colleagues. The fact that [the petitioner] boasts membership in these highly esteemed organizations is evidence of her superior reputation as a physician-scientist." The petitioner submitted no evidence of the societies' membership requirements, and neither [redacted] claimed the authority to speak on behalf of any of the societies.

On August 3, 2010, the director issued a request for evidence, stating that the petitioner's initial submission contained many unsupported claims. For instance, the petitioner referred to "job offers," whereas the submitted evidence "reported job possibilities, but no actual job offers were found." The director acknowledged counsel's assertion about the importance of citations, and instructed the petitioner to submit copies of articles that include citations to the petitioner's work. The director also instructed the petitioner to submit independent documentation to support witnesses' claims about the groundbreaking nature of the petitioner's research.

The petitioner's response included a cover letter in which counsel stated that the response included "[l]etters . . . detailing [the petitioner's] contributions to neurology and neurocritical care," as well as "[s]upplementary materials including additional information in regards to [the petitioner's] work judging others in her field, additional research contributions, et al." Counsel did not state that the response included any evidence of citation or job offers, or explain why the initial submission referred to both without including either.

The petitioner submitted a personal statement, expressing her "firm commitment to continue on a permanent basis to practice in the field of neurocritical care both clinical practice and in research" and stating that she was "in the process of applying and interviewing for faculty positions." That this process continued several months past the petition's filing date lends support to the director's conclusion that the initial filing did not document any actual job offers.

The petitioner's response to the request for evidence did not include any evidence of citation of her work. Instead, under the heading "Scientific and Scholarly Contributions," the petitioner submitted a copy of a 2010 article from *Alcoholism: Clinical and Experimental Research*, by several researchers at the University of Missouri-Columbia (where the petitioner trained from 2006 to 2009). The article contains no citation of the petitioner's work, but in the "Acknowledgments" section, the authors thanked the petitioner and two others "for historical and data analysis." The petitioner did not explain how assisting with "historical and data analysis" amounts to a "Scientific and Scholarly Contribution" of wider significance.

The petitioner submitted nine new witness letters, similar in tone to the first group of letters. [redacted] chief of house staff in neurosurgery at [redacted] stated: "I have utilized [the petitioner's] important research numerous times in my own practice, and I am certain that fellow physicians have as well."

[redacted] associate professor at the Medical College of Wisconsin, Milwaukee, reviewed a paper that the petitioner had submitted for a conference presentation. [redacted] stated: "It is very well known within the medical community that the research work [the petitioner] has performed in the last few years has been amongst the most important to the critical care medical field in recent years."

In a follow-up letter, [redacted] stated that the petitioner "is indeed regarded as one of the top neurology specialists currently practicing throughout the world. She earned a widely renowned reputation for both her great clinical skills and novel clinical research critical for the advancement of neurocritical care."

[redacted] associate professor at Michigan State University, East Lansing, stated that the petitioner "has made a great name for herself in the medical community."

Professor [redacted] of the University of Missouri stated that the petitioner "was one of our brightest house staff" during her time there. [redacted] stated: "I have been told she continued her stint at the Cleveland Clinic," this wording standing in contrast to that of other witnesses who claim that researchers and physicians nationwide have closely tracked the petitioner's career.

The remaining four witnesses are all on the staff of the [redacted] director of the neurocritical care fellowship program, stated that the petitioner's work "has gained her national recognition."

[redacted] in her second letter, called the petitioner "one of the best I have worked with."

Staff physician [redacted] stated that the petitioner's "contributions have been very important at the Cleveland Clinic. I have applied her impressive original research to my own practice of medicine, and am well aware that many of my colleagues do so as well."

[redacted] stated: "It is very well known within the medical community that [the petitioner] has developed a reputation as having foremost abilities."

The director denied the petition on January 7, 2011. The director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but found that the petitioner had not established that her individual impact in her field was sufficient to warrant the national interest waiver. The director acknowledged the petitioner's submission of several witness letters, but asserted that objective documentary evidence, "such as heavy citations of her published findings," would have been "more persuasive." The director noted counsel's earlier assertion that citations are "the most objective indicator of the impact that one's work has had." The director stated that, despite counsel's claims, the petitioner had not submitted any evidence of citation of her work, only a mention in the acknowledgments of an article by colleagues.

The director quoted from the letters submitted in response to the RFE, and found that the petitioner had not submitted independent evidence to corroborate the witnesses' more extravagant claims. The director also stated: "It is not plausible that any major research contribution to medicine which has been implemented by physicians in patient care would leave no paper trail of such an impact beyond solicited letters." The director concluded that the petitioner failed to submit "evidence [that] distinguishes the petitioner from other neurologists to any significant degree."

On appeal, counsel contends that the witness letters explained the petitioner's national impact, and that the director did not give those letters sufficient consideration. Counsel states: "The evidence submitted illustrates the advances that [the petitioner] has made within her field, and show that [the petitioner] has played and continues to play a chief role in her research work."

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec.

158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Here, many of the witnesses have made claims that purport to be matters of fact rather than expert opinion, regarding objectively verifiable matters such as the membership requirements of a given professional organization. The letters contain a series of such claims that the record fails to corroborate. Many of these claims are so exaggerated that their credibility is in serious doubt. For instance, a number of witnesses have contended that the petitioner has achieved a national or international reputation as one of the best in her field, but the witnesses have rarely provided many details about this reputation. Many of the witnesses have strong credentials themselves, but these qualifications merely serve to illustrate the gulf of experience and accomplishment between those witnesses and the petitioner. The AAO agrees with the director's finding that the objective evidence of record simply fails to offer any credible support for what appear to be highly exaggerated claims in the witnesses' letters.

Counsel contends that the labor certification process would interrupt the petitioner's work in the United States, "potentially on a permanent basis." This is an unsupported assumption. Counsel repeats the claim that the petitioner's combination of clinical and research duties is not suitable for labor certification, even though the regulation that counsel previously cited to support that claim actually shows that the Department of Labor will readily consider a combination of duties under appropriate circumstances.

The petitioner's combined research and clinical positions have all been admittedly temporary training assignments. Therefore, notwithstanding counsel's claim that the petitioner is an "indispensable member of her current department" [redacted] her position within that department was time-limited, regardless of the petitioner's immigration status and the outcome of the petition. The petitioner has not documented any formal offer of permanent employment from the Cleveland Clinic, and no indication that the labor certification requirement has prevented such an offer being extended. USCIS records show that the petitioner has since left the [redacted] and is now working at [redacted]

In terms of permanent positions involving both research and clinical medicine, most of the petitioner's witnesses hold medical school faculty positions that involve exactly that combination. As the former Immigration and Naturalization Service (now USCIS) noted in *NYSDOT*, the Department of Labor has a separate labor certification procedure for college and university teaching positions. *Id.* at 218 n.4. The specific regulations have since changed, but the current regulation can be found at 20 C.F.R. § 656.18.

Counsel contends that the petitioner has submitted "clear evidence" of "great contributions to the field through both her research work as well as clinical abilities." The petitioner has submitted ample evidence that she has been active as a researcher, a physician, and an instructor of less experienced medical students. The record does not, however, contain "clear evidence" of the importance of the petitioner's contributions. The witness letters contain high praise of the

petitioner's work, but for reasons already explained, key claims in those letters lack evidentiary support.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.